IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.963 OF 2005

WITH

CRIMINAL APPLICATION NO.7619 OF 2005

Bhagavat Dhondiram Mane : Appellant.

versus

The State of Maharashtra : Respondent

Mr.Anil Subramaniam for the appellant.

Smt.V.R.Bhosale, APP, for the State.

CORAM : D.G.DESHPANDE

V.K.TAHILRAMANI JJ.

DATED : MAY 05, 2006.

ORAL ORDER

1. Appellant is the original accused No.1 who has been convicted by the trial Court for the offence punishable under Section 302 r/w 34 of the Indian Penal Code and sentenced to undergo imprisonment for life.

2. This appeal was admitted earlier by the Division Bench. The applicant/accused thereafter moved this Criminal Application No.7619 of 2005 for bail. However, the learned advocate appearing for the accused submitted that he would be arguing on the point of sentence and that Section 302 of the Indian Penal Code in any case is not attracted. Therefore, he should be heard on that point. The learned APP for the State took no objection for hearing this matter in that regard. Therefore, we heard the learned advocate for the accused and learned APP for the State.

3. The prosecution case is that on 14/8/2003 at about 23 hours in the land bearing Gat No.506 of Pandurang Dadu Madane at village Karanje, the accused in furtherance of their common intention assaulted deceased Dhondiram Bhairu Mane by means of sticks of babhul and bamboo and forcibly administered poison by name Rogar and as a result, said Dhondiram died on next day.

4. Learned counsel for the accused, in the background of this case, firstly contended that in the C.A. report no poisoning was found nor

the prosecution could prove that victim Dhondiram died as a result of poisoning. The learned APP did not contradict this aspect of the matter. Other evidence against the accused is of assault to the deceased. In that regard our attention was drawn by the counsel for the accused to the fact that even if the prosecution case is accepted as it is, the accused alleged to have caused certain fractures to the deceased by using sticks. He has produced before us, the xerox copy of the Post mortem report in which Column No.17 describes the injuries. They are as under:-

> Contusion over left arm from midpart to upper 1/3 of forearm;
>
> CLW one post aspect of the contusion over Rt.arm in upper part 6’ x 6’;
>
> CLW over lateral aspect of 1’ leg 3 inches above lateral tuberosity.
>
> There were three fractures. Two on humorous and third on tibia fibula.

The learned counsel appearing for the accused contended that in no case and looking to the fact that deceased of 50 years of age, these injuries could have been resulted in death and since the prosecution case about the death by poisoning cannot be believed and accepted, as has been done by the trial Court, this particular accused can be convicted under Section 325 of the Indian Penal Code.

5. On the other hand, the learned APP for the State tried to contend that the injuries were serious and that offence could come under section 326 of the Indian Penal Code.

6. In this case, the weapons used are sticks and the length and width of the sticks do not show that they were deadly weapons. Even if the accused had assaulted and caused those three fractures, his conviction under Section 302 cannot be sustained and, therefore, we are constrained to allow the appeal partly. Hence

the following order :-

:ORDER:

Appeal is partly allowed.

Conviction of the accused under Section 302 of the Indian Penal Code is set aside. He is acquitted of that charge.

However, the appellant/accused is convicted under Section 326 of the Indian Penal Code and sentenced to suffer R.I. for five years. He is entitled for set off.

In view of this, order the Criminal Application No.7619 of 2005, which is for bail, does not survive. It is disposed of.

[D.G.DESHPANDE,J]

[V.K.TAHILRAMANI,J]